

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1495

To be argued by
MAX WILD

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

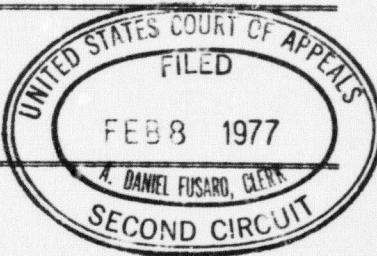
-against-

SAVERIO CARRARA, MICHAEL DE LUCA,
ANTHONY DI MATTEO, BARIO MASCITTI,
JAMES V. NAPOLI, SR., JAMES
NAPOLI, JR., EUGENE SCAFIDI,
SABATO VIGORITO, and ROBERT VOULO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT
JAMES V. NAPOLI, SR.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-1495

UNITED STATES OF AMERICA,

Appellee,

v.

SAVERIO CARRARA, MICHAEL DE LUCA,
ANTHONY DI MATTEO, BARIO MASCITTI,
JAMES V. NAPOLI, SR., JAMES
NAPOLI, JR., EUGENE SCAFIDI,
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Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT,
JAMES V. NAPOLI, SR.

PRELIMINARY STATEMENT

James V. Napoli, Sr. respectfully appeals from a judgment of conviction entered on October 15, 1976 (Mishler, Ch. J.) following a jury verdict finding him guilty of a substantive violation of the anti-gambling statute, 18 U.S.C. §1955.* He received a five year prison sentence and a \$20,000 fine and is on bail pending appeal.

*Reference to "Section _____" or "§ _____" are to Title 18 of the United States Code. "Rule _____" refers to the Federal Rules of Criminal Procedure. "A _____" means the appellants' joint appendix, "R _____" the record on appeal, "T _____" the trial transcript, and "HT _____" the transcript of the hearing held June 30 through July 2, 1976 on suppression of electronic surveillance.

Nine individuals are appealing convictions at this trial. Since several issues are common to most, counsel have divided the points in order not to burden this Court with repetitious argument. Accordingly, to the extent applicable we adopt the issues and arguments advanced by all co-appellants, pursuant to Rule 28(i), F. R. App. Proc.

This brief shows that suppression of evidence obtained through electronic surveillance was improperly denied and that the count on which Napoli was convicted was insufficiently pleaded.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that, when an order is issued, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. ("Title III"), authorizing electronic surveillance, the order implicitly authorizes government agents to make secret forcible entries onto private premises to install, move, maintain, recharge and/or remove their bugging devices.

2. Whether the District Court erred in holding valid an order, which authorized government agents to make a secret, forcible nighttime entry onto private premises to recharge batteries on bugging devices when: (a) there was no order authorizing electronic surveillance then in effect, (b) the special Attorney had not been authorized by the Attorney General to seek a new order authorizing electronic surveillance, and (c) there was no showing of probable cause to the issuing judge through

affidavits or sworn and recorded testimony as required by the Fourth Amendment, Title III or Rule 41..

3. Whether the District Court erred in failing to grant defendant's application for suppression based upon the government's wilful violation of Title III in order to obtain a tactical advantage over defendant.

4. Whether the District Court erred in finding that there existed probable cause sufficient under Title III to permit electronic surveillance of the HiWay Lounge.

5. Whether the District Court erred in holding Count Four to have been sufficiently pleaded.

STATEMENTS OF FACTS

Twenty of twenty-two defendants were tried together on four counts of a seven count indictment.* Count Two charged five named individuals, not including Napoli, Sr. or Jr. and others with violating the anti-gambling statute (§1955) from March 1972 to July 1972. Count Three made a similar charge against five others not including either Napoli for the period December 13, 1972 to March 9, 1973. Count Four charged both Napolis and twelve others with a §1955 violation for the period April 13,

*The remaining counts were severed and remain open. One of them charges a violation of §1962. That count was dismissed by Judge Mishler in the original indictment on the ground that the conduct charged did not come within the ambit of the statute. On July 1, 1976 this Court reversed in a 2 to 1 decision. 542 F.2d 104. Rehearing with suggestion for rehearing en banc were denied and on January 10, 1977 certiorari was denied. The issues in that appeal are not here relevant.

1973 to June 15, 1973. Count Seven charged all 22 defendants with a conspiracy to violate §1955.*

The only evidence tending to incriminate either of the Napolis was tape recordings of intercepted conversations made by the use of electronic surveillance.

There are a total of eleven orders authorizing or relating to electronic surveillance covering at least an 80 day period. There are only four to which this brief is addressed.** Three orders for bugs at the HiWay Lounge (hereinafter the "HiWay") as follows: April 12, 1973 for 15 days (hereinafter "HiWay I"); May 3, 1973 for 15 days (hereinafter "HiWay II"); May 24, 1973 for 20 days (hereinafter "HiWay III")*** and the fourth order, entered on May 2, 1973 after expiration of HiWay I and before the Attorney General had authorized HiWay II (hereinafter the "May 2 order"), allowed FBI agents to enter the HiWay during the night of May 2-3, 1973 to recharge the batteries on the bugs planted there during HiWay I.

* For ease of presentation of the case to the jury, the counts of the indictment were renumbered so that the Counts One, Two and Three were the substantive counts and Count Four was the conspiracy count. Throughout this brief reference to "Count Three" and "Count Four" shall, unless otherwise stated be to the third substantive count and the conspiracy count, respectively. The Napolis were named only in these counts.

** A schedule of all of the orders is set out in Schedule "A" in the appendix to this brief. Since evidence seized in Apartment 309 was used against Napoli in both the HiWay I application and the trial, we press our objections to these matters which we raised below and join in Mascitti's brief.

***The fruits of HiWay III were suppressed for untimely sealing. Accordingly, no further reference is made to this order in this brief.

After receiving the HiWay I order, the government made a secret entry "between midnight and dawn" into the HiWay "using a skeleton or pass key" and installed two bugs (A 197). The application for HiWay I did not seek court permission for this entry and the order made absolutely no provision for any entry in connection with its execution (A 274-302). While the government claimed that there was a brief informal discussion with the issuing judge concerning entry, it admitted that this discussion, which it said took place during the course of his review of the application, was neither recorded nor under oath (A 205, 228-229, 301). Moreover, there is no record support for any finding of explicit antecedent judicial approval of this break-in.

During HiWay I the agents made a second forced night entry to move one of the bugs from the bar area to the dining room area where the other was located, (A 197-198). The government admitted that it did not inform the issuing judge either before or after the second break-in of that fact (A 229-230). Under the statutory scheme the issuing judge has an obvious continuing duty to supervise electronic surveillance he has authorized.

During execution of HiWay I agents intercepted a conversation, from which they determined that an incriminating conversation would take place between Napoli, Sr. and one Abbatemarco on May 3, 1973 (A 200). HiWay I would expire before May 3. The Special Attorney applied to the Attorney General for permission to seek a new intercept order. By the afternoon of May 2 he had still not received the Attorney General's approval. The batteries on the bugs, which were apparently still

in place, were dead (A 198, 200-01).* Fearing that they might miss the May 3 conversation, the Special Attorney went before another judge and obtained an order authorizing a break-in during the night of May 2-3 to recharge the batteries (A 201, 303). It is undisputed that no sworn statement was made to that judge and no record made of that application. Its lack of formality is apparent in the order's face (A303).

During the night of May 2-3, pursuant to the May 2 order and while there was neither an electronic surveillance order in force nor even permission to apply for one, the agents again broke into the HiWay and recharged the batteries (A 201). It was not until 1:25 P.M. on May 3 that the government obtained HiWay II from the judge who had issued HiWay I (A 202). It is obvious that the bugs could not have been recharged in time to begin listening during the afternoon of May 3.

The government admitted that it probably made another secret, nighttime forced entry during the pendency of HiWay II or III to again recharge the bugs (A 198). There exists no record showing that this entry was even called to the attention of either of those issuing judges.

Finally, it is clear that the bugs were removed in yet another secret, nighttime forced entry without any semblance of judicial authority.

*It is not clear how the government learned that these batteries were dead unless they eavesdropped at the HiWay after expiration of HiWay I.

Thus, there were at least five forced, surreptitious entries to install, move, maintain and recharge the bugs. Defendants sought suppression on this ground, inter alia.

Judge Mishler denied suppression (A 130-44). Addressing himself to the break-ins during HiWay I and II he stated that

"there is implicit in the court's order concomitant authorization for agents to covertly enter the premises to install the necessary equipment" (A 133).

"Entry to install bugging devices is but a mere condition precedent . . . if . . . an intercept order is to be effectuated." (A 134).

Although Judge Mishler implicitly recognized that the May 2 Order did not satisfy Title III, he held that it was not issued pursuant to that authority, but rather pursuant to the court's authority to issue a search warrant (A 136). All that is required to issue a search warrant, he held, was a showing of probable cause, which he found existed (Ibid.). The opinion failed to recite any sworn and recorded statement showing probable cause, as demanded by the Fourth Amendment and Rule 41 (c). We submit that no such showing exists in the record. Moreover, there is no record showing of compliance with any other requirement of Rule 41, e.g., inventory and return, and the opinion is silent on this score.

Finally, Judge Mishler placed great weight upon the informal and unrecorded discussions between the government investigators and the issuing judges to justify his conclusion that

"A record existed of the court's implicit

consent to nighttime entry by use of a pass key." (A 135)

In reaching this conclusion, Judge Mishler never mentioned the requirement of the Fourth Amendment, Title III and Rule 41, for sworn recorded proof. Judge Mishler did not find "implicit [court] consent" to the subsequent entries during HiWay I, II or III to move, recharge or remove the bugs. And there is no record support for any such finding. There were not even any informal discussions with the issuing judges upon which implicit authorization could have been granted.

Judge Mishler merely stated that if HiWay II (which he characterized as "an extension order") had issued, subsequent re-enteries did not require "express . . . authorization" (A 143 fn 14). He continued (A 143-44):

"If a court is apprised of the need to re-enter to fix failing devices at the time it is considering the application for the extension order, and the order in fact issues, there is inherent authorization for government agents to re-enter and repair spent equipment if entry is shown to be the only way by which reparation can be accomplished."

Judge Mishler's just quoted comment is purely academic. The government never went back to any judge for permission to re-enter and they admitted that there was probably at least one further entry to recharge batteries (A 198).

POINT I

THE GOVERNMENT'S UNLAWFUL AND UNAUTHORIZED
SECRET BREAKING AND ENTERING TO INSTALL,
MOVE, MAINTAIN, RECHARGE AND REMOVE ITS
ELECTRONIC SPYING DEVICES REQUIRES SUPPRES-
SION OF ALL EVIDENCE SO OBTAINED, AND ANY
FRUITS THEREOF

A. Introduction to Argument

Our Founding Fathers wisely sought to protect us from the governmental oppression which they had escaped. See Berger v. New York, 388 U.S. 41, 58 (1967). In the Fourth Amendment, they forcefully and precisely provided:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Their wisdom has been enduring.

Our Courts have always protected our Fourth Amendment rights from prosecutorial excesses by acting as "neutral magistrate[s]" exercising "detached scrutiny" in antecedent examinations of warrant applications. Katz v. United States, 389 U.S. 347, 356 (1967); Aguilar v. Texas, 378 U.S. 108, 111-13 (1964). The need for judicial scrutiny assumes even greater importance in electronic surveillance, as Judge Kaufman recently wrote in two cases ordering suppression. In United States v. Marion, 535 F.2d 697, 698 (2d Cir. 1976) (emphasis added) he wrote:

"To guard against the realization of Orwellian fears and conform to the constitutional standards for electronic surveillance operations elaborated in Katz

v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) and Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. Title III imposes detailed and specific restrictions upon both the interception of wire and oral communications, and the subsequent use of the fruits of such interceptions, in an effort to ensure careful judicial scrutiny throughout."

Chief Judge Kaufman reiterated this constitutional imperative only one week before suppression hearings began in this very case.

"Justice Brandeis tellingly observed almost 50 years ago that 'writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.' Olmstead v. United States, 277 U.S. 438, 476, 48 S. Ct. 564, 571, 72 L. Ed. 944 (1928) (dissenting). Mindful of this potential danger, Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq., prescribed specific and detailed procedures to ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits." United States v. Gigante, 538 F.2d 502, 503 (2d Cir. 1976) (emphasis added).

It is our view that Judge Mishler's decision erroneously approves judicial abdication of the court's constitutional and statutory supervisory obligations over searches by government agents. His decision is based upon the erroneous assumption that, although silent on the subject, Title III impliedly subsumes all rights to object to physical intrusions into private premises, which are made without antecedent judicial authorization or supervision. Judge Mishler erroneously relies upon governmental recollections of informal discussions with is-

suing judges in violation of the sworn record requirements of the Fourth Amendment, Title III and Rule 41. His decision is contrary to the teachings of the Supreme Court and this Court.

The effect of Judge Mishler's decision is to allow government investigators, armed with an order allowing them only to seize our words, to repeatedly and secretly break into our homes and offices, when they in their sole discretion deem it appropriate. This result cannot be allowed to stand.

Because of the importance and novelty of the issue, we make a detailed demonstration that the evidence obtained from this electronic spying, both directly and indirectly, must be suppressed for several separate and independent reasons:

1. Title III cannot constitutionally be read so as to permit secret trespasses in connection with electronic surveillance.
2. The court lacks power to authorize secret trespass, in connection with electronic surveillance.
3. Federal agents lack independent authority to trespass secretly in connection with electronic surveillance.
4. Assuming arguendo that the courts had the constitutional and legislative power to authorize trespass in connection with electronic surveillance, the failure of the prosecution to have obtained such antecedent

authority predicated upon a sworn, recorded showing of specific need was unlawful and unconstitutional.

B. Title III cannot constitutionally be read so as to permit secret trespass in connection with electronic surveillance

Title III is silent as to the method of installation, maintenance and removal of electronic spy devices. The lower court held that the issuance of an eavesdrop order which is otherwise valid carries with it the "implicit" authorization to engage in secret trespass. If this interpretation of Title III is correct, the statute must fall as unconstitutionally overbroad.

Title III was Congress' attempt to provide law enforcement authorities with the tools they claimed to need, while at the same time attempting to comply with the constitutional mandates discussed in Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967).

The legislative history of Title III contains several brief references to certain problems which might occasionally be encountered in covertly installing or maintaining electronic spying equipment and in obtaining audible recordings, as well as special concerns for physical invasions of privacy.

S. Rep. No. 90-1097, 90th Cong., 2d. Sess. 103 (1968); 114 Cong. Rec. 11,598 (1968) (remarks of Senator Morse); 114 Cong. Rec. 12,989, 14,481 (1968) (remarks of Senator Tydings). However,

the Act is completely silent on the subject.* This silence runs afoul of the Constitution.

The starting point of this argument is Berger, supra. There the Court struck down New York's eavesdrop statute as overbroad. As a threshold matter, the Court questioned whether the New York statute's requirement that there be a showing "that there is reasonable ground to believe that evidence of a crime

*The government will undoubtedly argue that the requirement of 18 U.S.C. §2518(5) that "the authorization to intercept shall be executed as soon as practicable", satisfies this requirement and that it is a congressional recognition of the need for in-field flexibility of investigators, whose expertise in these matters exceeds that of the issuing judge. The government recently admitted that an order dealing with installation could be framed so as to "satisfy" their needs. Application of the United States (record and opinion sealed, see p. 35, *infra*). Furthermore, the argument flies in the face of the dictates of Berger, 388 U.S. at 59, 63-64, and Katz, 389 U.S. at 354-57, that there be close judicial supervision on these freedom-threatening actions and not reliance upon the investigator's good faith self restraint. Osborn v. United States, 385 U.S. 323, 329 fn 6 (1966). Moreover, while Congress recognized that there might be some difficulty in installing the devices, its concern was more particularly (and appropriately) focused upon staleness problems resulting from delay in execution. Compare Sgro v. United States, 287 U.S. 206 (1932). Senate Rep't No. 90-1097, 90th Cong., 2d Sess. (1968) p. 103. Additionally, the government's own Agent's Manual For Conduct of Electronic Surveillance Under Title III views this statutory provision as addressed only to the staleness problem:

"VII D. Prompt installation of interception device

The investigative agency should install the intercepting device as soon as authorization is obtained so that the authorized time period does not begin to run after the initial probable cause has grown stale. Whether execution of the warrant was sufficiently prompt is a question of fact which decided adversely to the Government would be fatal in a motion to suppress."

National Wiretap Commission, Commission Hearings, Vol. 1 (1976) at 811.

"may be thus obtained" satisfied the Constitutional demand for "probable cause". 388 U.S. at 55-56, 58-59. Next the Court found the statute wanting because it failed to particularize the "specific crime", "'the place to be searched' or 'the persons or things to be seized' as specifically required by the Fourth Amendment". Id. at 55-56, 59. The Court also found the period of statutorily permissible surveillance too long. Id. at 59, 60. Additionally, it condemned the lack of a notice requirement. Id. at 60.

Berger did not itself require a separate order on an additional showing of need before one can secretly trespass to install the devices. Therefore, the government will argue, none was constitutionally required. That argument is without merit.

First, Berger was not a narrow attack on the New York statute. It was a broadside, exposing some of the more glaring statutory deficiencies. And while Berger did not itself establish the requirement of prior judicial approval for each entry, it leaned heavily on Osborn v. United States, 385 U.S. 323 (1966). There two judges had authorized the use of a body recorder based upon a sworn detailed statement establishing probable cause respecting a "specific criminal offense directly and immediately affecting the administration of justice". 388 U.S. at 56-7. The Berger Court placed great reliance upon the "safeguards" established in Osborn. (Id. at 57):

"Under it the officer could not search unauthorized areas.... In addition, the

order authorized one limited intrusion rather than a series or a continuous surveillance. And, we note that a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one."

Indeed on reviewing Berger's analysis of Osborn, the opinion in Katz noted that "Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' Id., at 57." 389 U.S. at 355 (footnote omitted)

Second, Berger was not intended as a complete legislative model of a constitutionally sound eavesdrop law. The Court, having made its observations, concluded:

"Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does." Id. at 64.

Katz held that a trespass was unnecessary to invoke the Fourth Amendment's protection against the "uninvited ear". 389 U.S. at 352. The government will, therefore, contend that by broadening an individual's protection, the Court either eliminated or subsumed attacks predicated upon actual physical invasions. The trial judge held (A 133), that satisfaction of the other rigorous requirements of Title III affords all of the protection against both trespass and being overheard to which a citizen is entitled. This view is erroneous.

Katz simply recognized that the property-oriented "underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions

that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.... The fact that the electronic device...did not happen to penetrate the wall of the [telephone] booth can have no constitutional significance." 389 U.S. at 353.

The fact that the Court may have broadened an individual's right to challenge a governmental invasion not rising to a trespass, cannot logically be turned against a citizen who actually suffered a physical intrusion, in addition to the seizure of his words. Katz, which involved a listening device placed on the outside of a phone booth, had no occasion or reason to deal with the rights of one who had also been the victim of a trespass.

"Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." 389 U.S. at 354

There is simply no basis to conclude that the Court, in its far reaching opinion, ever intended to restrict existing individual liberties. To the contrary, the Court observed "that the Fourth Amendment protects people and not simply 'areas'...." Id. at 353 (emphasis added).

Indeed the government, at the time of Berger, recognized the right of a citizen to complain of a physical intrusion in aid

of electronic spying. Only a few days after Berger the Attorney General issued a memorandum to the Heads of Executive Departments and Agencies.* In it he recognized that "Eavesdropping . . . which is accomplished by means of a trespass into a constitutionally protected area is a violation of the Fourth Amendment. Silverman v. United States, 365 U.S. 505 (1961)." (emphasis added). He also anticipated Katz:

"And, although the question has not been squarely decided, there is support for the view that any electronic eavesdropping on conversations in constitutionally protected areas is a violation of the Fourth Amendment even if such surveillance is accomplished without physical trespass or entry."

Accordingly, he ordered that there be "advance approval from the Attorney General [for electronic surveillance of] . . . non-telephone conversations. . . ." He required that the written request for his approval include "(b) the type of equipment to be used; . . . (d) the proposed location of the equipment; . . . and (f) the manner or method of installation."

Nor have other courts concluded that the right to complain of a physical entry is lost in an eavesdrop case. Thus, in United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) the government had placed electronic "beepers" to permit tracking in a drum of contraband and in the defendant's truck. A warrant was obtained only with respect to the latter.** The court held that suppression

*A copy of the memorandum is reproduced in the record of hearings held by the Senate Committee on the Judiciary (90th Cong., 1st Sess.) pp. 922-24.

**It is noteworthy that after the beeper on the truck failed, the agents secured a second court order authorizing its repair or replacement.

was correctly denied as to the beeper in the contraband because it was installed while the drum was in the possession and control of the chemical company. Id. at 33-34.* The court held that the issuance of the warrant barred suppression as to the beeper in the truck, specifically recognizing the continued viability of the trespass doctrine (Id. at 34):

"Had the agents not resorted to a warrant, entrance into the garage and opening the truck's hood would have been an invasion of an area in which Hufford had a reasonable expectation of privacy."

In so deciding the court quoted from and relied upon Lopez v. United States, 373 U.S. 427, 439 (1963) and United States v. White, 401 U.S. 745 (1971). The relevant portion of the Ninth Circuit's quotation from Lopez was (Id. at 34):

"And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment."

The New York and Massachusetts legislatures have recognized the constitutional requirement for specific authorization for physical entry, supported by a recorded and sworn particularization of need therefor. The New York eavesdrop statute provides, in relevant part:

0
"An eavesdropping warrant must contain:

* * * *

* Contra United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), rehearing en banc granted and opinion withdrawn, 525 F.2d 1364 (1976)

8. An express authorization to make secret entry upon a private place or premises to install an electronic device, if such entry is necessary to execute the warrant." C.P.L. §700.30.

The Massachusetts eavesdrop statute provides, in relevant part:

"The application must contain the following:

* * * *

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect;" M.G.L.A. c.272 §99 F.2g., St. 1968, c.738 §1.,

and

"A warrant must contain the following:

* * * *

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant;" M.G.L.A. c. 272 §99 I.5; St. 1968, c.738 §1.

In any balancing of the liberties guaranteed by the Fourth Amendment and the professed needs of law enforcement, the scales must be weighted in favor of personal liberty.* Thus, in Berger the Court stated (388 U.S at 63):

*There have been serious questions as to the need for any electronic surveillance. For example, in United States v. Kalustian, 529 F.2d 585,590 (9th Cir. 1976), the court, in holding the showing of a particularized need for electronic surveillance to be inadequate, observed that in California, where there is a prohibition against electronic surveillance, police activities have not been impeded.

"It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment."

Circuit Judge Lay echoed these views in his forceful dissent in United States v. Agrusa, 541 F.2d 690, 702-04 (8th Cir. 1976):

"I question whether the effective enforcement of our criminal laws require government agents to break and enter private premises, like common burglars, to plant eavesdropping devices.

* * * *

Even if no other practical means of surveillance existed, however, a grant of authority for forcible entry of private premises with the speculative hope of obtaining some future conversation concerning criminal activity would still not be justified. The government's interest in law enforcement does not outweigh the citizen's justifiable expectation that governmental officials will not, under cloak of authority, surreptitiously break into his home or office. I would hope that there still exists 'a private enclave where [a person] may lead a private life without fear of stealthy encroachment by governmental officials. This sanctity must give way only when the government's interest is paramount. When we weigh such interests, we should do so most carefully.

* * * *

Rather than draw artificial distinctions, I would hold searches such as this to be unreasonable per se." (footnote omitted).

The majority of the original panel in Agrusa struggled to bend concepts uniquely applicable to execution of search

and arrest warrants into apparent conformity with their obvious result orientation*. They finally propounded the narrowest rule of which they could conceive:

"We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announce-

* For example, the court struggled with 18 U.S.C. §3109, which authorizes breaking and entering under very limited circumstances in connection with the execution of a "search warrant". They conceded that by its very language this statute "would surely defeat the Government's claim." 541 F.2d at 699. The majority failed to recognize that Title III was a comprehensive and self-contained plan, and, therefore, reference to pre-existing statutes, such as §3109 or the All Writs Act (28 U.S.C. §1651(a)) was inappropriate. See, Application of the United States, 538 F.2d 956, 961-63 (2d Cir. 1976) (cert. granted) (the "Pen Register Case") and Application of the United States, 427 F.2d 639, 643 (9th Cir. 1970) (the "Wiretap Case"). Holding that §3109 should not be "woodenly applied", 541 F.2d at 699, the majority commenced a convoluted and confusing analysis of authorities which, under various circumstances, particularly "exigent" in nature, upheld searches and/or entries made without warrant or announcement. *Id.* at 699-701. Particular reliance was placed upon the "destruction of evidence" theory. Such an exception in an eavesdrop case would swallow the rule. It is beyond question that people knowing that they are being listened to by the government will not talk. Ceasing conversation is a far cry from destroying existing evidence. The panel's analysis is at war with the clear language of Katz, (389 U.S. at 357-58) (footnotes and citations omitted):

"Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent."

The "destruction of evidence" exception was too absurd to even merit mention.

ment break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III." Id. at 701.*

The majority expressly limited its holding to the above conditions and stated that absent express prior judicial authorization to break and enter, "the resolution becomes much more difficult". Id. at 696 fn.13. Rehearing en banc was denied by a vote of 4 to 4, with the dissent stating (Id. at 704):

"We entertain great doubt of the validity of a judicial order which authorizes such a break-in. We tend to agree with the views of Judge Lay...."

Agrusa, then, was effectively an affirmation by an equally divided court. A petition for certiorari is pending.

The decision below is largely bottomed upon the notion that secret trespass is "but a mere condition precedent...if the purpose behind the intercept order is to be effectuated." (A 134) (emphasis added). This conception is not surprising for a court which would "enshrine the process of electronic surveillance" (A 131) rather than "the concepts of privacy which the Founders enshrined in the Fourth Amendment. ..." United States v. White, 401 U.S. 745, 756 (1971) (Justice Douglas dissenting).

*The Panel decision was substantially based upon the notion that a business was not entitled to the same level of privacy as a home. Id. at 699-700. Judge Lay's dissent (later joined by three of his brothers) rejected this concept as "artificial". Id. at 704. Judge Lay's decision is fully supported by the Supreme Court's recent decision in G. & M. Leasing Corp. v. United States, U.S. , 20 Cr. L. Rep't'r 3039-41. (January 12, 1977).

However, it is not only at odds with the spirit and language of Berger, 388 U.S. at 63, but completely overlooks the additional mischief that may attend electronic surveillance involving physical invasions of one's home or business, in addition to seizing one's words. Secret physical invasion effectively permits the investigators to rummage throughout the premises, searching every nook and cranny in the guise of seeking an appropriate place to hide the "bug". The secret governmental invasion combines the worst elements of a search for physical evidence and electronic listening. The investigator is effectively given unbridled discretion to make repeated secret entries to "maintain" and "move" his insidious devices. No time limitations are placed upon the period he may remain. No limitation is placed on the areas in which he may roam. No inventory is required of what he may have seen and marked for later seizure. No practical way exists to determine whether his improper observations have advanced the investigation. In addition to the constitutional liberties thus trampled upon, one must consider the very serious risk to life and limb that may result from the use of burglar's tactics. It is quite conceivable that these agents could have been involved in a gun battle with local police. To blithely say that the unrestrained secret entry is a "mere condition precedent", stands the argument on its head. (emphasis added).

The rationale underlying United States v. Ford, 414 F.Supp. 879 (D.C. D.C. 1976) (appeal pending) fully supports our overbreadth argument. There, as in Agrusa, the government designed to seek antecedent court approval for their entries. The issuing judge order authorized the police to

"enter and re-enter...for the purpose of installing, maintaining and removing the electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem." Id. at 882.

Judge Gesell held that the order was constitutionally overbroad as follows:

"A warrant must be specific. It is not a general hunting license. Where more than one entry is involved each intrusion must be treated formally and approved in advance so that the judge or magistrate can supervise when and how the entry is to be accomplished. A separate determination of probable cause and reasonableness is required as to each intrusion upon private premises. See Berger v. New York, 388 U.S. 41, 57, 87 S.Ct. 1873, 1882, 18 L.Ed.2d 1040, 1051 (1967); Osborn v. United States, 385 U.S. 323, 328-30 & n. 6, 87 S.Ct. 429, 432, 17 L.Ed.2d 394, 399 (1966); see also Sen. Rep. No. 90-1097, 90th Cong., 2d Sess. 101 (1968) ('Where it is necessary to obtain coverage to only one meeting, the order [for electronic surveillance] should not authorize additional surveillance. Compare Osborn v. United States, 897 S.Ct. 429, 385 U.S. 323 (1966).') The authorization given in this instance did not limit the number of entries nor did it specify either the general time or manner of entry. Thus the authority given was far too sweeping.

Although the Court agrees that not every minor facial insufficiency must result in suppression, United States v. Vigi, 515 F.2d 290, 293 (6th Cir. 1975), cert denied, 423 U.S. 912, 96 S.Ct. 215, 46 L.Ed.2d 140 (1975), the overbreadth present here is not a technical matter which can be overlooked because of inadvertence or mistake. It goes to the heart of the warrant process. Electronic surveillance must be limited to situations in which there is the strictest adherence to constitutional and statutory standards, see, e.g., United States v. Giordano, 469 F.2d 522, 530 (4th Cir. 1972), aff'd, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), and the police cannot be

left with virtually unrestrained discretion in installing a surreptitious listening device, cf Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Moreover, Congress expected that warrants 'for electronic surveillance would be narrowly drawn to fit precisely the particular circumstances of the individual case. See Rep. No. 91-538, 91st Cong., 1st Sess. 20-21 (1969) ('The order entered by the court need not be in the form requested by the application; rather, it is anticipated that the order will be framed narrowly, consistent at once with the right to privacy of the aggrieved persons, on the one hand, and, on the other hand, the demonstrated and cognizable needs of the applicant and legislative policy favoring improved law enforcement manifest in this title.); Sen. Rep. No. 90-1097, 90th Cong., 2d Sess. 102 (1968) ('[Title III] is intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity (Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, 58-60 (1967), Katz v. United States, 88 S.Ct. 507, 389 U.S. 347, 355-56 (1967)).') Thus the Court is obliged to hold the warrant invalid on its face."*

A holding that the statute cannot be constitutionally interpreted to allow secret break-ins, will not result in a significant disruption to the government.

Thus, of 1220 court-ordered electronic surveillances between 1968 and 1973, only 26 involved bugs. National Wiretap

*Appellant recognizes that Judge Gesell impliedly held the Act to be constitutional and expressly held that it implied authority in the court to authorize breaking and entering. However, the reasoning which lead to his conclusion that the order was unconstitutionally overbroad compels the conclusion that the statute itself is unconstitutional if construed to permit secret entries. We recognize the reluctance to hold a statute unconstitutional, especially when the same result may be accomplished on another ground. However, this critical statutory silence violates the rule of Berger in a narrow sense just as the New York statute violated the Fourth Amendment in every aspect.

Commission Report, pp. 15, 43 (1976). Presumably, some of these bugs might have been planted by cooperating confederates while lawfully on the premises. Indeed, a reading of the first HiWay eavesdrop application discussing confidential informants on the premises gives rise to the presumption the devices were to be planted in that fashion. Parsons' Affidavit of April 12, 1973, ¶¶18(b) and (c), 21(a) (A. 287-89).*

Further, wiretapping would not be adversely affected, since, according to government explanation, it does not involve trespass. The government simply makes its tap at the telephone company office and leases direct lines to its own office or a "plant" connected to tape recorders (HT 118, 146, 343-44).

There are, of course, additional methods of securing evidence such as body recorders or transmitters on the informants on whose revelations the government relied to establish probable cause. See e.g. Hoffa v. United States, 385 U.S. 293 (1966); United States v. Agrusa, 541 F.2d at 703 (dissent). Moreover, parabolic microphones and lasers may enable one to overhear a conversation inside a building without there ever having been a physical intrusion. Berger, 388 U.S. at 46-47.

Finally, the government recently admitted that installation orders could be drawn with sufficient latitude to permit investigators to function in a fashion "satisfactory

*The government relied heavily upon these informants to establish probable cause for HiWay I.

to the Government." Application of the United States (record and opinion sealed, see p. 35, infra).

C. The Courts either lack or should not exercise the authority to permit secret breaking and entering in connection with electronic surveillance*

Nowhere in Title III are the Federal courts given authority to permit the government to break and enter in order to install electronic surveillance equipment. The only reference to the method of entry contained in the Act is in its 1970 amendment, added to §2518 (4) (e), which authorizes the court to order that persons lawfully in control of the premises cooperate in the installation of such devices.**

The legislative history of the 1970 Amendment, as found by this Court in the Pen Register case, supra, 538 F.2d at 962, is most instructive. This Court concluded that the 1970 Amendment was Congress' response to Application of the United

*We assume for the purpose of this subpoint that Title III is constitutional despite its failure to deal with physical intrusion.

** 18 U.S.C. § 2518 (4) (e) provides in relevant part:

"An order authorizing the interception of wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates."

States, 427 F.2d 639 (9th Cir. 1970) (hereinafter the "Wiretap Case"), in which the Ninth Circuit held that the Act neither expressly nor impliedly authorized the district court to direct the telephone company to assist in a wiretap. Id. at 643-44.

In the Wiretap Case the district court held it had no authority to direct the telephone company to assist government agents in installing a court ordered wiretap. In affirming, the Ninth Circuit analyzed the Act and its legislative history. On this analysis it rejected the notion that the district court had the power to so assist the government, stating (427 F.2d at 642):

"The Government acknowledges that Title III of the Act contains no specific provision conferring such a power. It argues, however, that this is not dispositive. The power to compel the cooperation of the telephone company, the Government urges, must be the concomitant of the power to authorize the interception, for without the former the latter is worthless.

The Government points to the Congressional findings, in section 801(c) and (d) of the Act, 82 Stat. 211, that the interception of wire communications 'is an indispensable aid to law enforcement and the administration of justice,' and that such interception should be allowed 'only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.' The Government argues that, implicit in these findings, is the conclusion that a corporation or a person ought not to be permitted to 'negate' the overriding legislative purpose and that the authorizing court must have the power to insure the effective execution of its orders."

After rejecting the government's contention that the court could follow the ancient principles of assembling a posse comitatus, the Court continued (427 F.2d at 643):

"The Government's entire case rests upon what it believes may be implied from the Act, and upon other general principles summarized above.

Title III of the Act is rather extensive, containing ten sections, some quite lengthy. It purports to constitute a comprehensive legislative treatment of the entire problem of wiretapping and electronic surveillance, complete with extensive introductory Congressional findings. The provisions contained in Title III state, in precise terms, what wiretapping and electronic surveillance is prohibited, and what is permissible. As to the latter, meticulous provision is made with respect to the necessity and manner of obtaining prior or subsequent judicial approval....

In view of the breadth and apparent self-sufficiency of this general statute, and the total absence of any provision even hinting that the court is to have authority to enter such a unique order as the Government here seeks, we think the existence of such authority is not lightly to be implied from the Act. Nor do we find any provision in the Act, or in the history of its enactment, which points in the direction of implied authority. Quite to the contrary, consideration of the constitutional significance of the legislation, the relevant provisions of the Act, and the legislative history tend in the opposite direction.

The court observed that it was dealing with a constitutional right and held that (427 F.2d at 643-44):

"If the Act is to survive a constitutional challenge...it can only do so by giving the Act as limited a construction as is warranted by the language used. The construction which the Government would give Title III, however, whereby an important judicial power not expressly provided for, would be implied, manifests not a limited, but an expansive, reading of the Act.

* * * *

The legislative history indicates that Congress was abundantly aware of the physical difficulties involved in effectuating non-observed wiretapping and electronic surveillance (114 Cong. Rec. No. 88, May 22, 1968, p.56107). Nor did Congress forget that telephone facilities would be involved in accomplishing such interceptions. See 18 U.S.C. § 2511(1) (b) (i); Senate Report No. 1097, 90th

Cong. 2d Sess. 1968, p. 2180. The Congressional findings set forth in section 801 of the Act, at the head of Title III, show an intent to define with utmost particularity the circumstances and conditions under which an interception may be effectuated. This intent is also manifested in the Senate Report referred to above, at p. 2153.

Congress thus acted advisedly when it formulated and enacted the legislation incorporated in Title III. It was fully aware of the physical problems involved in making investigative wiretaps, but it was nevertheless determined to enact a carefully circumscribed Act. In this setting it omitted any reference to a judicial power to require communication carriers to assist. We must conclude that the omission was purposeful, or at least that it remains unexplained on any basis which would warrant recognition of such a power by implication."

The Ninth Circuit, although questioning the government's claim that the telephone company's assistance was essential to effectuate the wiretap order, nonetheless held that such claim, even if it were true, was immaterial, stating (427 F.2d at 643-44):

"If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress."

Congress answered the Ninth Circuit's concluding shot by enacting the 1970 Amendment.

In the Pen Register Case this Court adopted the reasoning and result of the Wiretap Case. It rejected the government's appeal to exercise the Federal court's authority under the All Writs Act, 28 U.S.C. § 1651, to compel assistance on the claim that refusal to do so would, for practical purposes, invalidate an otherwise valid order for a pen register. 538 F.2d at 961-62. This Court, in holding that the district court's exercise of such power was "an abuse of discretion",

analyzed the 1970 Amendment in light of the Wiretap Case,
stating (538 F.2d at 962):

"we think it is just as reasonable, if not more reasonable, to infer that the prompt action by Congress was due to a doubt that the courts possessed inherent power to issue such orders, or that courts would be as willing to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. . . As Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authority should be used in connection with pen register orders...."

The Wiretap Case held that there was no implied authority under the Act to direct telephone company cooperation even in the face of the government's claim that failure to do so would invalidate a perfectly proper order. Although this Court recognized the similarity of wiretaps to pen registers and the fact that "the two [orders] are so often issued in tandem," it held that neither the necessity for the telephone company's technical assistance nor the 1970 Amendment impliedly authorized an exercise of the judicial power sought.

By a parity of reasoning it must be concluded that the power, as conferred by the 1970 Amendment, to order one lawfully in control of premises or facilities to cooperate with the government, does not implicitly authorize the court to authorize unassisted governmental secret breaking and entering. Had Congress intended to confer such power on the Federal Courts, it would have done so explicitly.

We are aware that the panel decision in United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976) (Cert. pending)

(Dec'd July 6, 1976) and Judge Gesell in United States v. Ford, 244 F.Supp. 879 (D.C. D. 1976) (appeal sub judice) found an implicit power in the court to authorize purely governmental breaking and entering under certain narrow circumstances to place and remove electronic surveillance devices.

Underlying Agrusa was the panel's frequent reference to and discussion of "exigent" circumstances. E.g., 541 F.2d at 696-701. This approach must be rejected under the explicit language in Katz (389 U.S. at 357-58) (footnote omitted):

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions."

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case."

Ford was predicated upon the court's view that (414 F. Supp. at 883):

"Since the statute does not bar the use of such devices by the police, Congress must be taken at least to have granted or impliedly recognized the general power of a court to authorize a covert and possibly otherwise illegal entry to place a "bug" under some circumstances."

This view is completely at odds with this Court's in the Pen Register case (538 F.2d at 962). It also conflicts with Marion, supra, 535 F.2d at 706 where this Court stated:

"Strict compliance with the requirements of § 2517(5) and the other strictures imposed by Title III is no less essential. See United States v. Capra, 501 F.2d 267, 276 (2d Cir. 1974). Congress carefully circumscribed utilization of the occasionally useful but potentially dangerous

law enforcement tools of electronic surveillance in an effort to comply with the Fourth Amendment and to protect effectively the privacy of wire and oral communications [and] the integrity of court and administrative proceedings. Pub.L. 90-351, Title III, § 801. To ignore or gloss over these restrictions, or view them as mere technicalities to be read in such a fashion as to render them nugatory, then, is to place in peril our cherished personal liberties." (footnote omitted) (emphasis added)

In our view Judge Gesell's carefully reasoned and documented opinion, holding that the issuing judge's order was constitutionally overbroad, commenced at the wrong level. His reasoning establishes that the statute itself is unconstitutional as shown in subpoint B above. We believe that the Wiretap and Pen Register decisions, and the standards of review enunciated by the Supreme Court in Katz and Berger, mandate a rejection of any finding of implicit statutory authority under Title III or the exercise of any inherent authority.

The Act was narrowly framed in an attempt to comply with the requirements established by the Supreme Court in Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967). It must be strictly construed against the government. United States v. Giordano, 416 U.S. 505 (1974); United States v. Gigante, 538 F.2d 502 (2d Cir. 1976); United States v. Marion, 535 F.2d 697, 698, 700, 706 (2d Cir. 1976).

D. Federal agents lack independent authority to trespass secretly in connection with electronic surveillance

Title III is silent with respect to the authority of government investigators to secretly break and enter. We believe

that the authorities and rationale discussed in subpoints B and C above amply demonstrate that no such authority may be implied and that the investigators have no independent or statutory authority to make secret entries to install, maintain, move or remove electronic spy devices, even if they have been properly granted authority to conduct electronic surveillance.

The only reported case of which we are aware which squarely confronts the issue is Judge Gesell's decision in United States v. Ford, which we have quoted from at length. Supra at 23-25. After a scholarly and comprehensive analysis, Judge Gesell holds that the Fourth Amendment, as construed in Katz, Berger, and Osborn, is offended by secret official intrusion to install electronic listening devices unless

"each instruction...[is] treated formally and approved in advance so that the judge or magistrate can supervise when and how the entry is to be accomplished. A separate determination of probable cause and reasonableness is required as to each intrusion upon private premises." 414 F. Supp. at 884.

The panel in Agrusa specifically declined to pass upon the admissability of eavesdrop evidence obtained through an entry without antecedent judicial authority, pointing out "that the resolution becomes much more difficult in that event...." 541 F.2d at 696, fn. 13. Circuit Judge Lay, in his dissent, stated, "...I would hold searches such as this to be unreasonable per se." 541 F.2d at 704. Judge Lay's views were approved by three of his brothers in their dissent from the denial of rehearing en banc,

Id. at 704, effectively making Agrusa an affirmation by an equally divided court.*

The Agrusa panel decision recognized that, by its very language, 18 U.S.C. §3109 barred break-in by the agents. Id. at 669. Nevertheless it attempted to find analogous common law situations, exigent in nature, which excused the necessity to make an announced entry for an arrest or search. Id. at 698-701. The panel apparently overlooked the fact that Katz rejected the notion that exigent circumstances might excuse compliance with the Fourth Amendment in the case of electronic surveillance. 389 U.S. at 585-86.

A recent sealed decision denied the government's application to install a bug in private business premises, after finding probable cause as required under Title III and that there existed "no other way to obtain the evidence."** That judge rejected Judge Mishler's view that an eavesdrop order carried "implicit ... authorization" to secretly enter to install such devices and that "entry to install bugging devices is but a mere condition precedent". to the order's

*It is our position that secret entries are unreasonable per se. However, we do not believe that this Court need go so far to direct suppression.

**The opinion was furnished to us by an attorney who had received it from the government. Before learning that it had been ordered sealed he sent us a copy. We transmit three copies of the opinion to this Court in a sealed envelope.

effectuation. That court agreed with Judge Gesell in Ford and the four dissenters in Agrusa. The investigation was into alleged illegal gambling. In denying permission to install the bugs, while recognizing that this might end the investigation, the court stated:

"a court has both the constitutional authority and constitutional duty to decline to authorize surreptitious entr in the absence of law enforcement needs which lack sufficient compulsion and urgency to be paramount over expectations of individual privacy."

E. Assuming arguendo that Title III constitutionally authorizes the courts to permit secret breaking and entering in connection with properly authorized electronic surveillance, each such entry must have antecedent judicial authority, supported by a sworn and recorded showing of need

This subpoint deals with two separate but related problems.

One is the entries during the pendency of the eavesdropping orders. It is undisputed that no provision regarding entry was made or applied for in HiWay I, II or III. It is also undisputed that no sworn recorded showing of need was made to the issuing judges.

The second is the entry when no eavesdrop order was in effect. That entry was pursuant to an order entered on May 2, 1973 authorizing a secret break-in to recharge the batteries of the devices.* It was made upon an oral, unrecorded and unsworn application of the Special Attorney after HiWay I had expired and before the Attorney General issued authorization to seek a new eavesdrop order. The entry was made during that night, before issuance of authority even to apply for the new eavesdrop order. The vast bulk of the interceptions received at trial occurred using the devices replenished pursuant to the May 2 order.

We argued below that, assuming the constitutionality of a surreptitious entry, all such entries in connection with electronic surveillance had to be approved in advance upon a formal, recorded, sworn statement as mandated by the express language of the Fourth Amendment. We further argued that there existed no authority in the district judge to have issued the May 2 order. Finally, it was urged that, even if, arguendo, the agents might, after receiving proper judicial authority to

*The order of May 2, 1973 provided in its entirety:

"Pursuant to the statement of facts related to this Court by Fred Barlow, Special Attorney (to be supplemented by [sic] affidavit May 3, 1972), and pursuant to Judge Bartels' Order of April 12, 1973, authorizing interception of oral communication at the HiWay Lounge, 362 Metropolitan Avenue, Brooklyn, N.Y., it is ordered that the FBI is authorized to enter the subject premises the night of May 2-3, 1973, to effect any extension of Judge Bartels' Order of April 12, 1973." (A 303).

conduct electronic surveillance, make a secret entry, the May 2 entry during which they replenished dead batteries tainted all subsequent interceptions. Without that entry the electronic devices would have failed to provide any of the evidence obtained on HiWay II and introduced.

Dealing with HiWay I, II and III, Judge Mishler held that a proper eavesdrop order carried "implicit" authority to surreptitiously break and enter to install the devices. He then found that the issuing judge gave "implicit consent to nighttime entry" based upon his conversations with the Special Attorney contemporaneous with the issuance of the order (A 135). He further held that the May 2 order did not have to comply with Title III since it

"simply authorized entry, seizure, and reparation of the malfunctioning devices. As such it was more properly characterized as a search warrant and the full set of requirements as detailed in 18 U.S.C. §2518 (3) need not be satisfied. Only probable cause need be found to justify its issuance. More than ample probable cause existed. Hence, the order lawfully issued." (A 136) (footnote omitted).

We believe that Judge Mishler's holding violates both the Fourth Amendment and Title III.

We have already shown the absence of any implicit authority in the agents or courts to conduct or authorize surreptitious forced entries in connection with electronic surveillance. We deal now only with the requirement of the establishment of a record to support the assumed judicial power to authorize such conduct. In our view it makes no difference

whether the May 2 order is regarded as an eavesdrop order or a traditional search warrant.

The Fourth Amendment is the starting point. It explicitly mandates that no warrant issue, except upon a showing of probable cause "supported by oath or affirmation". Title III carries this constitutional imperative much further before electronic surveillance may be used.

Even if the May 2 order were merely an application for a warrant to search for physical evidence, as the court below held (A 136), Rule 41 mandates suppression. It provides in relevant part:

"(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant . . . Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit . . . The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned." (emphasis added).

None of the requirements for the issuance of the warrant have been satisfied. No affidavits were sworn to before the judge. No hearing was held. No record was made or kept. There was no record showing of need to authorize a night execution. No provision was made for a return. No return was made.

Moreover, if this was a traditional search and seizure an inventory would have had to "be made in the presence of ... the person from whose possession or premises the property was taken." Rule 41(d).

Thus, if the May 2 order is to be considered a search warrant, it is deficient on its face. No attempt was made to comply with the requirements of Rule 41 in its issuance or execution. Certainly, had an inventory been immediately served, it would have alerted the Napolis and there would have been no further interceptions.* This clearly taints all further evidence obtained by electronic spying.

If, on the other hand, this order was some sort of eavesdrop order, it fails, for no attempt was made to comply with Title III. First, there was no approval from the Attorney General to make application. §2516(1); United States v. Giordano, 416 U.S. 505 (1974). Second, there was no formal application (§2518(1)). Consequently none of the required showings were made. Third, the order, on its face, does not comply with any requirement of §2518(3) or (4).**

Thus, on the face of the matter neither the May 2 or-

*We also believe that this unlawful entry vitiated all subsequent interceptions achieved as a result of the rejuvenation of the batteries.

**Since there was no eavesdrop order in effect when the May 2 order was issued, the government cannot even argue that the court possessed power under the All Writs Act (28 U.S.C. §1651 (a)). That Act limits the court to issuing writs "in aid of ... [its] jurisdiction". No pending eavesdrop order - no jurisdiction. Compare the Pen Register Case, 538 F.2d at 961.

der (no matter how it may be characterized) nor HiWay I and II are in compliance with the requirements of the Fourth Amendment, Title III or Rule 41. Accordingly, this Court need look no further.

Judge Mishler, however, relied upon statements in the suppression hearing record in which the government sought to explain what had in fact transpired before the issuing judges on the question of the installation, rejuvenation and removal of the devices. (A. 113-6). The record does not support his conclusions. (See A 198, 200-01, 205-06, 227-30). The record shows that there was no sworn matter presented to the issuing judges respecting the manner of installation, positioning, repositioning, maintenance or removal of the equipment. It also shows that there was absolutely no control exercised by those judges on this score either. Apart from the initial informal conversation, there was no further contact with the judges regarding maintenance, positioning or removal of the devices. Moreover, a comparison of the testimony of the FBI agent and the Special Attorney as to what occurred before Judge Bartels demonstrates the crucial importance of a written record as mandated by the Fourth Amendment, Title III and Rule 41.

More importantly, neither the Fourth Amendment, Title III nor Rule 41 permit such an evaluation. Judge Gesell's opinion in Ford, 414 F. Supp. at 881-85 clearly demonstrates that the court below erred in relying upon evidence as to what had transpired before the issuing judges. He pointed out that the decision to install the devices through the ruse of a bomb scare

had been "orally presented to the Judge in chambers without a transcript Id. at 881. He noted that the "'bugs' were installed in about a half hour's time" Id. at 882. When it was determined that the bugs were not working the court orally approved a reentry. "No transcript was taken." (Ibid.) Judge Gesell summed up the situation as follows (Id. at 883):

"As indicated, the proof shows that in fact the authorizing Judge carefully monitored the situation. Periodic reports were made to the Judge. It is also apparent that conversations were had with the Judge concerning the means of entry in advance, namely, the bomb scare ruse; that the malfunctioning after the first entry was promptly reported; and that the Judge thereafter discussed re-entry by another bomb scare ruse. Thus the judge knew in advance what the police were going to do and approved it as reasonable. Moreover, it cannot be claimed that the ruse itself was unreasonable since the policy in fact entered as police, which they actually were, and they merely dissimulated as to their purpose."

He stated however (Ibid.):

"Nevertheless, while the Court in fact 'held reins' on the police conduct under the authorizing order, the question of facial overbreadth is still a troubling one."

He ultimately concluded that the unrecorded transactions by which the government sought to establish both its good faith and the propriety of the conduct of the issuing judge could not be accepted and that the warrant would have to stand or fall on its face (Id. 884-85):

"The Assistant U. S. Attorney attempts to avoid the consequences of this overbreadth by making a proffer to the effect that the Judge in fact approved each entry in advance and knew that contrary to the broad terms

of the warrant the police were planning to enter at a reasonable time, for valid reasons each time and by what appears to be a wholly proper ruse. As already indicated, the Court is satisfied that these representations are correct. The difficulty, however, is that the Assistant's discussions with the Judge on which he bases his representations were not transcribed or presented by affidavits. Thus a formal record is wholly lacking and, as a practical matter, there is no supporting record to review. Under these circumstances the warrant as written is binding and exclusive, see United States v. Armocida, 515 F.2d 29, 45-46 (3d Cir. 1975), cert. denied sub nom. Conti v. United States, 423 U.S. 858, 96 S.Ct.111, 46 L.Ed.2d 84 (1975). Moreover, the approach used by the Judge here is inconsistent with the congressional intent as to the proper procedures to be followed, see Sen. Rep. No. 90-1097, 90th Cong., 2d Sess. 102 (1968) ("[18 U.S.C. §2518(2)] provides that the judge may require the applicant to furnish additional testimony or documentary evidence in support of the application. The additional testimony need not be in writing, but it should be under oath or affirmation and a suitable record should be made of it. The use of a court reporter would be the best practice."; see also Fed.R.Crim.P. 41(c).")

There simply exists no basis upon which the secret and unauthorized break-ins can be sustained. Suppression is required.

POINT II

SINCE THE GOVERNMENT'S WILLFUL FAILURE TO NAME VIGORITO IN ITS HIWAY II APPLICATION WAS A DELIBERATE ATTEMPT TO VIOLATE TITLE III IN ORDER TO OBTAIN A TACTICAL ADVANTAGE OVER NAPOLI, THE EVIDENCE OBTAINED AS A RESULT MUST BE SUPPRESSED

Napoli, Sr. also sought suppression below on the ground that the government intentionally violated Title III in order to

gain a tactical advantage over him. The violation was the failure to name Appellant Vigorito in the Hiway II application as a person ... committing the offense ... whose communications are to be intercepted" as required by §2518 (1)(b)(iv). Donovan v. United States, ____ U.S. ___, 20 Cr. L. Rep't'r 3043 (January 19, 1977). (A 234-36). The omission was intentionally made to enable the government to seize an anticipated conversation of Napoli, Sr. which, they believed, they would miss if they named Vigorito. Judge Mishler never addressed himself to this point in denying suppression.

Appellant Vigorito sought suppression for failure to name him. After a hearing Judge Mishler denied suppression, holding that there was not enough shown to

"warrant a finding of probable cause to believe that Vigorito's subsequent conversations would be seized by the bugging device" (A 106).

We believe that Judge Mishler erred. Probable cause to name Vigorito in the HiWay II application was shown by his regular attendance at the HiWay and the fact that he was actually intercepted in a criminal conversation during HiWay I. The fact that he was generally observed in the front of the HiWay, rather than the rear dining room, cannot justify Judge Mishler's conclusion that there was no probable cause to believe he would be intercepted again. While the bugs were in the dining room there was no showing that they could not pick up conversations from the front room -- and, in fact, they did. There was certainly no impediment to Vigorito's walking about in the HiWay. More-

over, it strains reason to suggest that, as an important member of the gang, there was no probable cause to believe that he converse in the rear dinning area. Judge Mishler found, in holding Napoli, Sr. had standing, that he "used the HiWay Lounge solely for his gambling enterprise...." (A 130). Indeed, Judge Mishler found probable cause to connect defendants Di Matteo and Mascitti with Apartment 309 on much less evidence. See brief of Mascitti. Even if this Court were ultimately to agree with Judge Mishler, it is clear from both his decision (A 104-07) and the hearing (see, e.g. HT 175-79) that the issue was a close one. Indeed, at the hearing after the Special Attorney admitted that Vigorito was heard on the last day of the HiWay I Order, Judge Mishler asked the Special Attorney:

"And is his name then revealed in the order of Highway II on May 3rd?"

The Special Attorney replied:

"No, the fact that the conversation was noted, your Honor, but his name did not appear as a subject because we wanted to get an extension order. And I knew from past experience that it would have taken another two weeks to get an authorization for the order if we changed the subjects - -" (HT 173-74).

The Special Attorney thus admitted that his failure to have named Mr. Vigorito in the HiWay II application was substantially motivated by his desire to seize the anticipated May 3 conversation.* In so doing he candidly admitted

*The extent to which the government was willing to go to seize this anticipated conversation is illustrated by the extraordinary and unlawful May 2 order which was discussed in Point IE of this brief. The fact that he may have referred to the conversation during HiWay I, in which Vigorito was overheard, did not relieve the burden of naming him as a subject.

that he was deliberately attempting to circumvent the double reviewing process (first by the Attorney General and second by the court) required by Title III.

It is our position that even if, arguendo, there did not exist probable cause to have named Mr. Vigorito, it was sufficiently close so that the Special Attorney's tactics must be regarded as an intentional act of deception, aimed first at the Attorney General and later at the court. Regardless of whether there was probable cause as to Mr. Vigorito, it is abundantly clear that he recognized it as a close question, and deliberately chose not to name him. Thus he wilfully sought to circumvent §2518(l)(b)(iv) in order to obtain a tactical advantage over Mr. Napoli. Compare, United States v. Chiarizio, 525 F.2d 289, 292 (2d Cir. 1975) ("... we would be extremely concerned if it became a common practice for government agents to justify in retrospect the names omitted from wiretap applications on the ground that government agents had forgotten or ignored important evidence already in the government's possession.").

There are numerous cases involving wilfully false statements included in applications to courts for search warrants and eavesdropping orders. In these cases the courts made no attempt to view the application with the false statement omitted. Instead, the courts recognize such tactics as attempted frauds on the judicial processes which were such great affronts that they could not be tolerated. The only remedy to be applied is suppression. E.g. United States v. Luna, 525 F.2d 4 (6th Cir. 1975), cert. denied, 424 U.S. 965 (1976) (collecting and discussing the cases and authorities in the area).

It is beyond question that a deception may be wilfully practiced by a knowing omission, just as easily as a false representation. For example §11(a) of the Securities Act of 1933, as amended, 48 Stat. 82, 15 U.S.C. §77k(a) recognized that a registration statement is false if it

"contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading... ." (emphasis added)

An intentional omission is a clear violation of Title III.

Because of this highly improper conduct, all evidence derived directly or indirectly from HiWay II must be suppressed. It is highly improbable that Napoli would have been convicted without use of the HiWay II intercepts.

POINT III

THE APPLICATIONS TO BUG THE HIWAY FAILED TO ESTABLISH PROBABLE CAUSE

We hereinafter demonstrate that the application for HiWay I did not establish probable cause sufficient to justify issuance of an eavesdrop order.*

*We argued below in a detailed brief that none of the applications established probable cause, that the prosecution failed to supply court-ordered progress reports, that certain of the applications contained material or wilful misrepresentations of seized conversations and that the government failed to establish the requisite need for electronic surveillance. Page limitations of appellate briefs preclude a full treatment of these points. However, should this Court not reverse on the arguments set forth herein, we ask that the original brief submitted below be considered in support of the instant appeal. Should the Court desire additional copies of that brief it will be promptly furnished. We also adopt the briefs of any co-appellants who may raise these points.

Title III requires that the prosecution establish probable cause (1) that the target individuals are involved in criminality, (2) that they are using the place for these unlawful purposes, and (3) that relevant communications will be intercepted there. §2518(3)(a), (d) & (b). The affidavit of Special Agent Parsons of April 12, 1973 fails to carry this burden. (A 274-302).

To establish probable cause to bug the HiWay Lounge, the application relies upon prior electronic surveillance of another place (Apartment 309) and conversations of individuals, only one of whom is the subject of the instant application, plus informant information and visual surveillance.*

The HiWay I application was made on April 12, 1973. The bulk of the conversations referred to therein occurred in 1972 (¶¶5 (a)-(b), 6, 7, 8, 9, A 281-85). No conversation occurred after January 1973, fully two and one half to three months before the instant affidavit (¶¶4, 5(e) & (f), 10-14, A 281-86). They are simply too stale to make our probable cause. Additionally, the conversations themselves are filled with untrustworthy gossip.

Taken on their face the intercepted conversations cited in the application fail to establish probable cause to

* The earlier affidavits were incorporated by reference. Contrary to Judge Mishler's holding, we believe that we demonstrated below that those affidavits failed to establish probable cause when originally submitted and their allegations are now stale. Accordingly they should not be considered as support for the instant application.

believe that the HiWay Lounge was being used for unlawful purposes. Indeed there is not one reference to the HiWay Lounge in the entire portion of affidavit headed "Electronic Surveillance" (A 281-86). Therefore, Judge Mishler's conclusion that the informant data (discussed below) was "corroborated by ... electronic surveillance" (A 291) has no record support.

The application next turns to "Informant Data". The information attributed to "confidential informant number one" (¶17, A 286-87) is too stale to be relied upon, his latest conversation having come on November 20, 1972, almost five months before the application. Moreover, to construe the conversation as incriminating requires a degree of speculation not permitted by Aguilar v. Texas, 378 U.S. 106 (1964) or Spinelli v. United States, 393 U.S. 410 (1969), United States v. Karathanos, 531 F.2d 26, 31 (2d Cir. 1976). Likewise, his later "observations" also require speculation that illegal gambling was being discussed which he did not overhear. And while the informant is claimed to have said that the HiWay Lounge was the "headquarters" in ¶17(b)(A 287), he contradicts himself in the previous subparagraph by saying that they meet "either at Crisci's, Bamonte's or at the HiWay Lounge". (¶17(a) A 286-87).

The information furnished by "informant number 2" is tainted by speculation. (A 287-88) The application states that the informant advised that a non-target "alluded to" the existence of a criminal relationship. Additionally, it asserts that the informant reported overhearing a conversation between a target and a non-target "that indicate" certain decisions must be taken

up with Napoli, Sr. Such words as "alluded to" and "that indicate" are too dubious to permit a finding of probable cause. And a later statement attributed to the informant to the effect that the observed Napoli, Sr. "meet with persons whom he personally knows to be involved in this gambling operation" must be rejected since it fails to establish how he knew these persons were involved in "this gambling operation". The application provides no basis to conclude that the informant was "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli, supra 393 U.S. 416, quoted in Karathanos, supra, 531, F.2d at 31. Since the informant is only alleged to have observed a meeting and not having heard the discussion, there is no justifiable basis to conclude that criminal gambling discussions took place.

The information allegedly furnished by "informant number three", coming one and one half months before the application is stale. (¶19 A 288). Additionally, the supposed corroboration of his prior information is highly questionable. He is supposed to have furnished information regarding 'pick-up' locations" (Ibid.). In their application of January 15, 1973 to bug Apartment 309, it was stated that FBI agents witnessed what they believed to be pick-ups. It may be that this application to bug the HiWay refers to the same events. An examination of that 309 application discloses that the agents did not even allege that they had seen anything pass. See ¶4 of the January 15, 1973 application included in the appendix to Di Matteo's brief.

The nature of the information allegedly furnished by "informant number 4" while suspicious, is not incriminating; nor is it stated when the informant obtained the information he provided on March 26. (¶20). Moreover, the allegation that Cassella "spends a lot of time in Brooklyn these days meeting JIMMY NAPP", does not constitute probable cause that they are, or will be, engaged in illegal gambling. (A 288-89).

Informant number 5's information suggests that, if Napoli had been involved in illegal gambling, it might well be ending because of police pressure. (¶21(a) A 289). His observations without overhearing and his feelings are insufficient to rise to the level of probable cause. There is no stated basis for the informant's conclusion that Casella "controls" certain New Jersey "gambling action". (A 288-89).

The information provided by informants 6, 7 and 8 are unsupported conclusions. Basically they refer to conversations with third persons not shown to be reliable or knowledgeable. They are merely examples of rumor mongering. (A 290-91).

Even if the application were read most favorably to the government, there is no showing of probable cause that §1955 was being violated. To violate that section there must be at least five individuals involved. Only six targets are named (Napoli, Sr., Napoli, Jr., Cassella, DiMatteo, De Lucca and Bascetta). Of the six the application is devoid of any suggestions that Bascetta was involved in illegal gambling. His activities are consistent with working as a bartender. An attempt is made to connect Napoli, Sr., Napoli, Jr. and

Casella in what may be called the New Jersey branch. Similarly, an attempt is made to connect Napoli, Sr., Napoli, Jr., De Luca and DiMatteo in what may be referred to as the New York branch. We argued below that at best for the prosecution these are separate gambling operations even if some have members in common. This theory, we said, was supported by the three different substantive counts. We further argued that, in neither branch is there any showing that five of the targets are involved together. While Judge Mishler never saw fit to respond to our above argument in his opinion denying suppression, he dismissed the conspiracy count and dismissed the substantive count against the New Jersey defendants for these very reasons.

The application next turns to "Visual Surveillances" (A 291-96). It should be noted from the outset that the summaries do not reveal who made the observations. At a minimum the court should have been presented facts sufficient to evaluate the reliability of this information. If the information is adjudged otherwise sufficient a hearing should have been held to determine its reliability. More importantly, the movements detailed simply do not make a showing of criminality.

Since the HiWay II application relied for probable cause principally on conversations intercepted during HiWay I, that application failed to establish probable cause.

POINT IV

COUNT FOUR OF THE SUPERSEDING
INDICTMENT IS NOT PLEADED WITH
SUFFICIENT PARTICULARITY TO
SATISFY THE MANDATES OF THE
SIXTH AND FIFTH AMENDMENTS TO
THE CONSTITUTION AND RULE 7(c),
F.R. CRIM. P.

The count upon which appellant was convicted does no more than track the language of §1955 and additionally allege that the "illegal gambling business" is "in violation of New York Revised Penal Code, Sections 225.00 through 225.40"*. Since this count does not hint as to the nature of the illegal gambling, much less "descend to the particulars", Russell v. United States, 369 U.S. 749, 765 (1962), it is insufficient. Judge Mishler brushed the argument aside stating that this and the other §1955 counts "are adequately pleaded and they satisfactorily apprise the defendants of the charges against them." (A 78A). We believe he erred.

The Sixth and Fifth Amendment to the Constitution, respectively, demand that an indictment, to be sufficient, be stated

*Count Four provides:

"From on or about April 13, 1973, to on or about June 15, 1973, within the Eastern District of New York and elsewhere, the defendants SALVATORE ANNARUMO, SAVERIO CARRARA, MARTIN CASSELLA, MICHAEL DE LUCA, ANTHONY DI MATTEO, JOHN LOTIERZO, SR., PASQUALE MACCHIROLE, BARIO MASCITTI, ANTHONY MASCUZZIO, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., HENRY RADZIEWICZ, SABATO VIGORITO and ROBERT VOULO unlawfully, knowingly and wilfully conducted, financed, managed, directed, supervised and owned all and part of an illegal gambling business, such business (1) having a gross revenue of two thousand dollars (\$2,000) on a single day, (2) remaining a [sic] substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violation of New York Revised Penal Code, Sections 225.00 through 225.40. [Title 18, United States Code, Sections 1955 and 2]"

with sufficient particularity: (a) to inform an accused of the nature and cause of the accusation in order to enable him to prepare his defense and (b) to enable an accused to plead double jeopardy. Russell v. United States, 369 U.S. 749, 764 (1962). These constitutional pleading requirements are embodied in Rule 7(c), F. R. Crim. P., which requires that an "indictment...shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." (emphasis added). E.g., United States v. Heinze, 361 F. Supp. 46, 56 (D. Del. 1973). A bill of particulars cannot cure an insufficient indictment. E.g., Russell, 369 U.S. supra at 769-70.

Since the count at bar did not incorporate by reference any other allegations or counts of the indictment, it must be considered as a separate self-contained indictment and stand or fall upon its own allegations. Davis v. United Sta'es, 357 F.2d 438, 440 (5th Cir.), cert. denied, 385 U.S. 927 (1966); United States v. Gordon, 253 F.2d 177, 180 (7th Cir. 1958); Walker v. United States, 176 F.2d 796, 798 (9th Cir. 1949); United States v. Heinze, 361 F. Supp. 46, 56 (D. Del. 1973); see Dunn v. United States, 284 U.S. 390, 393 (1932).

Indictments, such as the one at bar, which merely track the language of the statute, have been condemned as the Supreme Court explained in Russell, 369 U.S. supra at 765-66 (emphasis added):

"It is an elementary principle of criminal pleading, that where the definition of an offense whether it be at common law or by statute, 'includes generic terms, it is not sufficient

that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, - it must descend to particulars." United States v. Cruikshank, 92 US 542, 558, 23 L ed 588, 593. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." United States v. Simmons, 96 US 360, 362, 24 L ed 819, 820. "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; . . ." United States v. Carll, 105 US 611, 612, 26 L ed 1135. "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

Appellant recognizes that this Court has repeatedly stated that an indictment satisfies the constitutional mandates if it tracks the language and provides little more than the time and place of the crime. E.g., United States v. Bernstein, 533 F.2d 775, 786-87 (2d Cir. 1976); United States v. McClean, 528 F.2d 1250, 1256-57 (2d Cir. 1976); United States v. Bermudez, 526 F.2d 89, 94 (2d Cir. 1975); United States v. Trotta, 525 F.2d 1096, 1098-1100 (2d Cir. 1975); United States v. Clark, 525 F.2d 314, 315 (2d Cir. 1975); United States v. Cohen, 518 F.2d 727, 732-733 (2d Cir. 1975); United States v. Tramunti, 513 F.2d 1087, 1113 (2d Cir. 1975), cert. denied, 423 U.S. 832 (1975);

United States v. Sperling, 506 F.2d 1323, 1344-45 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); United States v. Salazar, 485 F.2d 1272, 1277 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974).

An analysis of each of the above cases reflects that the indictment provided those defendants with some factual information upon which they could, with some degree of confidence, prepare a defense and plead double jeopardy. Thus, the Bermudez indictment charged a conspiracy to distribute narcotics, identifying cocaine as the drug. And in Cohen the "means paragraph of the conspiracy spelled out the kickback scheme, the false Regulation A offering circular; the inducements to Denver Funds, and the controlled accounts." 518 F.2d at 732-33. Contrary to the instant indictment, the Cohen indictment incorporated these details by reference in the substantive counts. In McClean, defendants were informed that they were charged with violating Title III by intercepting wire communications over a specified period using a telephone tap on a telephone located at a particular address. 528 F.2d at 1256-57. In Bernstein, the indictment charging a false statement in connection with an FHA loan application (§1010) identified the date of submission of the allegedly false "application for mortgage insurance on property located at 416 52nd Street, Brooklyn, New York." 533 F.2d at 786, fn 8. In Sperling, the only attack upon the conspiracy indictment was its failure to identify certain persons with whom he acted in concert and the failure to specify each violation of continuing series. 506 F.2d at 1344. In Tramunti, the narcotics conspiracy indictment, besides tracking the statute, stated in broad terms the time and place of the

crime "and specified some 17 overt acts" 513 F.2d at 1113 (emphasis added). And in Clark, the indictment, besides tracking the language of the statute, identified the stolen item defendant transported. 525 F.2d at 315.

Count Four does not even hint as to the nature of the illegal gambling activity purportedly charged. The breadth of "gambling" is demonstrated by 18 U.S.C. § 1955 (b)(2), which defines "gambling" to include, but not be limited to,

"pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."

Thus, § 1955 itself gives appellant no assistance in ascertaining the nature of the gambling charged.

Nor do the sections 225.00 through 225.40 of the New York Penal Law clarify the ambiguity.

Section 225.00 merely contains twelve definitions relating to gambling.

Section 225.05 proscribes as a misdemeanor the promoting of gambling in the second degree, without specifying the nature of the gambling.

Section 225.10 proscribes as a class E felony the promoting of gambling in the first degree. This section includes engaging in bookmaking, receiving records or money in connection with a lottery or policy scheme.

Section 225.15 proscribes as a class A misdemeanor possession of gambling records in the second degree. Again this statute proscribes more than one kind of gambling activity, bookmaking, lottery or policy records, as well as possession of what appears to be "self-destruct" papers.

Section 225.20 proscribes as a class E felony the possession of gambling records in the first degree. Again this statute is not limited to one type of gambling activity, but covers three, bookmaking, lottery or policy.

Section 225.25, also alleged to be violated is in reality a defense to a charge of possession of gambling records.

Section 225.30 proscribes as a class A misdemeanor the manufacture sale, transportation and a number of related types of acts regarding slot machines and other gambling devices.

Section 225.35 deals with the method of proof of a violation of §§ 225.15 and 225.20 and presumptions. Obviously, this section cannot have been violated as charged.

Finally § 225.40 merely denies a defense to a lottery charge. Obviously, this statute could not be violated by any gambling activity.

It is thus clear that neither the indictment's tracking of §1955 nor its citation of §§225.00 through 225.40 of the New York Penal Law provides appellant with any information as to the nature of the supposedly illegal gambling activity the grand jury

charged. Indeed, several of those statutes, i.e., the defenses, presumptions, denials of defenses and definitions are not even capable of violation. Thus, from the indictment there is no basis to conclude that the grand jury heard evidence to the effect that appellant violated every provision of each of the state statutes allegedly violated.

At a bare minimum, the indictment should have alleged the nature of the gambling activity, as did the indictment in United States v. Marrifield, 496 F.2d 1278, 1282 (5th Cir. 1974), which identified a single section of state law and alleged that the nature of the gambling activity violating that multifaceted statute was "a business for placing bets on dice and cards". Likewise, the §1955 indictment in United States v. De Cesaro, 54 F.R.D. 596, 597 (E.D. Wisc. 1972) was held sufficient because, beside tracking the statute, it alleged that the defendants did specified acts with respect to the gambling business during a specific 22 day period. Although the opinion does not identify the acts charged, it is clear that they must have described the nature of the gambling activity. And while the indictment is not quoted in United States v. Politi, 334 F.Supp. 1318, 1321 (S.D.N.Y. 1971) (Gurfein, J.), the reference to "policy" strongly suggests that the indictment charged that particular type of gambling.

Judge Latchum's dismissal of the indictment in United States v. Heinze, 361 F.Supp. 46 (D. Del. 1973) is rationally indistinguishable from this case. The defendants there were charged, inter alia, with violating and conspiring to violate the reporting requirements of the Landrum-Griffin Act (29 U.S.C.

§ 439(a); by failing to file a report allegedly mandated by 29 U.S.C. § 433. Section 433 contained four subparagraphs, several of which in turn contained subdivisions. Each of these several subparagraphs and subdivisions thereof mandated the filing of a report with the Secretary of Labor in cases of different and distinct types of activities. The defendants there moved to dismiss for insufficiency, namely the failure to allege the facts upon which the reports were required under § 433 Judge Latchum agreed, stating (361 F.Supp. at 56):

"...§ 433(a) requires reports from employers on four different and distinct types of payment. The factually bare allegations of Count 4 fall far short of informing Obrow which of the four subsections of § 433(a) his failure to file a report violated. From the lack of essential factual details pleaded, it conceivably could be any of the four. For this reason Count 4 will be dismissed." (See the court's expanded discussion at 316 F.Supp. at 50-51)

It is indeed difficult to conceive of a closer decision to the instant case than Heinze, supra. The statute there was part of a comprehensive Congressional scheme aimed at labor racketeering. 29 U.S.C. § 401. Congress, with the Landrum-Griffin Act, sought to proscribe activities at least as broad and certainly as important as gambling. It was precisely because of the breadth of that anti-racketeering statute's scope that Judge Latchum concluded that an indictment which merely tracked the statutory language did not conform to the constitutional sufficiency standards established and discussed by the Supreme Court in Russell, supra, in its earlier decisions quoted and discussed therein, and in the lower court cases approved therein.

In Russell, supra, an indictment charging the refusal to answer certain questions which "were pertinent to the question under inquiry" was held insufficient because it "failed to specify the subject under inquiry" 369 U.S. at 765-66.

Similarly, in United States v. Little, 317 F. Supp. 1308, 1309-1 (D. Del. 1970), the defendant was charged with wilfully failing to answer "certain questions on schedules submitted to him in connection with the 1970 Decennial Census. . . ." Although the applicable statute made it a crime to refuse to answer any question on any schedule, the court dismissed that indictment as insufficient because it failed to appraise the defendant of the particular questions he had refused to answer.

Likewise in Wright v. United States, 243 F.2d 546, 547-48 (6th Cir. 1957) the majority of the court disapproved of an indictment because it merely charged that the defendant had received a firearm in violation of 26 U.S.C. § 5821, without specifying or identifying which of its distinct and different subprovisions had been transgressed. Reversal was denied, however, only because the defendant had failed to make a timely pretrial motion.

Not only does Count Four fail to specify the particular state statutes and subparts thereof allegedly violated, but it also fails to allege, even in the bare language of state statutes, the essential elements of the state crimes allegedly committed. There is a substantial body of judicial authority,

developed particularly in the conspiracy area, which requires that when an offense under one statute depends upon the violation of an underlying statute, as is the case here, each of the essential elements of the underlying statute must be pleaded with particularity. Nelson v. United States, 406 F.2d 1136, 1137-38 (10th Cir. 1969) (and cases collected therein at footnote 5); United States v. Strauss, 283 F.2d 155 (5th Cir. 1960); United States v. Berke Cake Co., 50 F.Supp. 947, 949 (E.D.N.Y. 1943). Appellant recognizes that courts are not in agreement with this principle e.g., United States v. Heinze, 361 F.Supp. supra at 50. Appellant urges that even if, arguendo, the constitutional mandates of the Fifth and Sixth Amendments do not reach this far, Rule 7(c) and the Court's general supervisory powers over the administration of justice certainly do. The rationale of Nelson, supra, certainly represents the fairer approach and should, in the interests of justice and especially in light of the minimal pleading burden to the prosecution, be followed.

The vice in this indictment is further illustrated in a closely related case under a prior New York anti-gambling statute (former §974 of the Penal Law). In People v. Hendricks, 232 App. Div. 186, 249 N.Y.Supp. 676, 678-79 (1st Dep't 1931) the Appellate Division dismissed the information, finding a fatal variance between the charge that the defendant had possessed "policy slips" and the evidence which established that he had possessed "collection sheets", although the statute under which that defendant was tried outlawed possession of both.

In a later analysis the New York Court of Appeals found

the Hendricks information deficient because of its lack of specificity, stating (People v. Williams, 10 N.Y.2d 382, 384-85, 223 N.Y.S.2d 474, 476 (1961)):

"The information in that case [Hendricks] charged the defendant with possession of 'a certain writing, paper, document, record and policy slip'. There is no indication that the information there spelled out exactly what it was in the defendant's possession that violated the statute. In this case the information distinctly specifies comptroller's ribbons, thereby limiting the crime charged to be a violation of the latter part of section 975 - possession of materials used in the operation of policy. Section 975 provides for two separate crimes and a person can be found guilty of one without being guilty of both."

For the foregoing reasons we believe that Count Four does not measure up to the constitutionally mandated pleading burdens, even under this Court's much relaxed standards.

POINT V

JAMES NAPOLI, SR. ADOPTS ALL
LEGAL ISSUES RAISED AND ARGUMENTS ADVANCED BY ALL CO-
APPELLANTS

To avoid burdening the Court with duplicative arguments on common issues, appellants have divided such issues amongst themselves for briefing. Accordingly, Napoli, Sr., pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure hereby adopts, to the extent pertinent, all legal issues and arguments advanced by all co-appellants.

CONCLUSION

The judgment of conviction should be reversed and the case remanded with instructions to suppress the fruits of all electronic surveillance and grant James V. Napoli, Sr. a separate trial on the third substantive count.

Respectfully submitted,

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SCHEDULE "A"

ORDERS RELATING TO ELECTRONIC SURVEILLANCE

There were a total of eleven orders authorizing or relating to electronic surveillance covering at least an 80 day period. Basically, they are divisible by the premises and telephone involved as follows:

1. The 1969 New York State order for a wiretap on movant's home telephone;
2. The April 1970 order issued by the Federal district court in New Jersey authorizing a wiretap on a public telephone in the Mile Square Tavern.
3. Two May 18, 1970 orders:
 - a) E.D.N.Y. for a wiretap on a public telephone in the HiWay Lounge, and
 - b) S.D.N.Y. for a wiretap on movant's home telephone;
4. Five E.D.N.Y. orders directed at an alleged policy bank, Apartment 309, 8-15 27th Avenue, Astoria, Queens (hereinafter "Apartment 309") as follows:
 - a) December 8, 1973 - authorizing the placement of an electronic eavesdropping device (a "bug") for 15 days;
 - b) December 20, 1972 - authorizing the installation of a pen register to record numbers.

called from the telephone in Apartment 309 for
20 days;

a) January 15, 1973 - authorizing another bug
for 15 days;

d) January 18, 1973 - authorizing another pen
register for 20 days;

e) February 20, 1973 - authorizing a wiretap
for 15 days;

5. Three E.D.N.Y. orders for bugs at the HiWay
Lounge (hereinafter the "HiWay") as follows:

a) April 12, 1973 for 15 days (hereinafter
"HiWay I");

b) May 3, 1973 for 15 days (hereinafter "HiWay
II");

c) May 24, 1973 for 20 days (hereinafter
"HiWay III")

6. An E.D.N.Y. order, entered on May 2, 1973 after
expiration of HiWay I and before the Attorney General had authorized
HiWay II (hereinafter the "May 2 order") to allow FBI agents to en-
ter the HiWay during the night of May 2-3, 1973 to recharge the
batteries on the bugs planted there during HiWay I.